

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MERCK & CO., INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 06-230 (GMS)
	)	
APOTEX, INC.	)	<b>JURY TRIAL DEMANDED</b>
	)	
Defendant.	)	

**APOTEX INC.'S MOTION FOR LEAVE TO FILE OVERSIZED BRIEF  
AND FOR EXPEDITED HEARING THEREON**

Defendant Apotex, Inc. ("Defendant" or "Apotex") moves for leave to file an oversized brief. Specifically, Apotex requests leave to file its Reply In Support Of Its Motion For Leave To File Its First Amended Answer, Affirmative Defenses, and Counterclaims on December 8, 2006 that will not exceed 35 pages. In support of its motion, Apotex states as follows:

1. On October 13, 2006, Apotex filed a motion for leave to file its First Amended Answer, Affirmative Defenses, and Counterclaim. (D.I. 28) The motion was 7 pages long.

2. On November 7, 2006, Plaintiff Merck & Co. Inc. ("Plaintiff" or "Merck") filed its answering brief in opposition to Apotex's motion. (D.I. 38) Merck's brief was 39 pages long. Merck basically argued that Apotex's amendment was futile because its antitrust counterclaim failed to state a claim for relief under Fed. R. Civ. P. 12(b)(6). In effect, Merck's response was a Rule 12(b)(6) motion.

3. Furthermore, on November 22, 2006, Merck filed a 16-page brief in opposition to Apotex's 2-page motion for leave to substitute corrected exhibits to its

pending motion for leave. (D.I. 44) In its November 22<sup>nd</sup> opposition brief Merck supplemented its arguments regarding *Noerr-Pennington* immunity. Because the arguments raised in Merck's November 22<sup>nd</sup> opposition overlapped with the arguments raised in Merck's November 7<sup>th</sup> opposition, and since Apotex's reply in support of its November 3<sup>rd</sup> motion for leave was due before its reply in support of its October 13<sup>th</sup> motion for leave, Apotex chose to defer responding to Merck's substantive *Noerr-Pennington* arguments until its December 8<sup>th</sup> reply.

4. The page limitation for response briefs is 40 pages, whereas the page limitation for replies is 20 pages. *See* L.R. 7.1.3.(D). Because Apotex's brief that is due this Friday, December 8<sup>th</sup>, is a reply in support of its motion for leave, the local rules specify that the reply be limited to 20 pages. *See* L.R. 7.1.3.(D). However, in effect Apotex's brief is a response to Merck's Rule 12(b)(6) motion. If the brief was actually a response, Apotex would be entitled to the 40-page limitation.

5. Apotex will not be able to fully and fairly respond to all the arguments raised by Merck in its opposition brief within the 20-page limitation for replies. Apotex therefore requests leave to file a reply brief that will not exceed 35 pages.

6. Following a meet and confer pursuant to Local Rule 7.1.1, counsel for Merck does not agree to this motion.

WHEREFORE, Apotex requests leave to file an oversized reply brief in support of its motion for leave to file its First Amended Answer, Affirmative Defenses, and Counterclaims that will not exceed 35 pages, and that this request be heard at the Court's earliest convenience.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

A. Sidney Katz  
Robert B. Breisblatt  
Louise T. Walsh  
Michael Krol  
Welsh & Katz, Ltd.  
120 S. Riverside Plaza, 22<sup>nd</sup> Floor  
Chicago, Illinois 60606  
Tel: (312) 655-1500  
Fax: (312) 655-1501

By: /s/ Richard L. Horwitz  
Richard L. Horwitz (#2246)  
Kenneth L. Dorsney (#3726)  
Hercules Plaza, 6<sup>th</sup> Floor  
1313 N. Market Street  
P. O. Box 951  
Wilmington, DE 19899  
Tel: (302) 984-6000  
[rhorwitz@potteranderson.com](mailto:rhorwitz@potteranderson.com)  
[kdorsney@potteranderson.com](mailto:kdorsney@potteranderson.com)

Dated: December 5, 2006  
765822/30234

*Attorneys for Defendant Apotex, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**CERTIFICATE OF SERVICE**

I, Richard L. Horwitz, hereby certify that on December 5, 2006, the attached document was hand delivered on the following person and was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

Mary B. Graham  
James W. Parrett, Jr.  
Morris, Nichols, Arsht & Tunnell, LLP  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899-1347

I hereby certify that on December 5, 2006, I have Electronically Mailed the attached document to the following:

John F. Lynch  
Howrey, LLP  
750 Bering Drive  
Houston, TX 77057-2198  
[lynchj@howrey.com](mailto:lynchj@howrey.com)

Nicolas G. Barzoukas  
Suzy S. Harbison  
Jason C. Abair  
Weil, Gotshal & Manges  
700 Louisiana, Suite 1600  
Houston, TX 77002  
[nicolas.barzoukas@weil.com](mailto:nicolas.barzoukas@weil.com)  
[suzy.harbison@weil.com](mailto:suzy.harbison@weil.com)  
[jason.abair@weil.com](mailto:jason.abair@weil.com)

I hereby certify that on December 5, 2006, I have Federal Expressed the attached document to the following non-registered participants:

Paul D. Matukaitis  
Merck & Co., Inc.  
One Merck Drive  
Whitehouse Station, NJ 08889-0100

Edward W. Murray  
Gerard M. Devlin  
Merck & Co., Inc.  
126 E. Lincoln Avenue RY28-320  
Rahway, NJ 07065-0907

/s/ Richard L. Horwitz

Richard L. Horwitz  
Kenneth L. Dorsney  
Potter Anderson & Corroon LLP  
Hercules Plaza – Sixth Floor  
1313 North Market Street  
P.O. Box 951  
Wilmington, DE 19899-0951  
(302) 984-6000  
[rhorwitz@potteranderson.com](mailto:rhorwitz@potteranderson.com)  
[dmoore@potteranderson.com](mailto:dmoore@potteranderson.com)

728942